



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

May 9, 1978

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ARIZONA ATTORNEY GENERAL

Re: 78-91 (R78-2)

Ms. Juanita Harelson
State Representative
Arizona House of Representatives
Phoenix, Arizona 85007

Dear Ms. Harelson:

In your letter of January 4, 1978, you ask whether a school district may legally pay the full salary of a regularly employed teacher who is an elected, paid city official and also pay for a substitute teacher for the time that the teacher is absent from school while performing city duties.

Under certain circumstances a person may hold two public positions¹ at the same time and receive dual compensation therefor. Coleman v. Lee, 58 Ariz. 506, 513, 121 P.2d 433 (1942).

1. The term "public position" as used in Coleman v. Lee would include a public employee, like a school teacher, and an appointed or elected public officer like a city councilman or mayor.

2. See, e.g., Op. Atty. Gen. No. 70-7-L, discussed in this opinion. No. 76-41 concluded that a state employee may be compensated for two positions if the conditions set forth in 70-7-L, supra, are met. No. 69-24-L stated: "Highway patrolmen may be employed during their off duty hours from the Highway Patrol and receive compensation from the Coliseum and Exposition Center Board as fair and ground marshals without violating A.R.S. § 38-601". No. 62-70-L found that the Board of Supervisors may employ a resident doctor as health director and at the same time said doctor may be compensated by the county for treatment of indigents, so long as the duties of the two positions are not the same. Finally, No. 56-37-L concluded that a superintendent, principal or teacher may serve on a school election board in the district in which he is employed and receive payment for such service.

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This office has also considered the question of dual compensation of public officers and employees.² The most comprehensive opinion, Op. Atty. Gen. No. 70-7-L, considered a question presented by the State Superintendent of Public Instruction. In concluding that members of an advisory council to the Department of Education could receive compensation from the Department at the same time that they were employees of either a state university or a school district, No. 70-7-L summarized the following common law requirements:

This office has taken the position on several occasions that the quoted provisions^[3] do not necessarily prohibit dual compensation

3. The following constitutional and statutory provisions were quoted in 70-7-L:

Art. IV, Pt. 2, § 6 contains the following prohibition:

No member of the Legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the State of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment as a teacher or instructor in the public school system. (Emphasis added.)

Art. IV, Pt. 2, § 17 prohibits an increase or decrease of compensation during the term of a public officer:

The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer, other than a justice of the peace, be increased or diminished during his term of office; provided, however, that when any legislative increase or decrease in compensation of the members of any court or the clerk thereof, or of any board or commission composed of two

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for two separate public positions provided the two positions are not incompatible with each other within the meaning of Coleman v. Lee, 58 Ariz. 506, 121 P.2d 433 (1942), and provided the additional compensation is not payable for the performance of regular duties of the first office within the meaning of Pima County v. Anklaam, 48 Ariz. 248, 61 P.2d 172 (1936). However, where a public officer or employee seeks to collect additional compensation from public funds for performance of the same work or duties, § 38-601 prohibits such extra compensation.

(footnote 3, continued)
or more officers or persons whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member or clerk of such court, or any member of such board or commission, it shall be effective from such date as to each thereof.

Art. 22, § 17 provides:

"All State and county officers (except notaries public) and all justices of the peace and constables, whose precinct includes a city or town or part thereof, shall be paid fixed and definite salaries, and they shall receive no fees for their own use."

A.R.S. § 38-601:

"State or county officers, employees, members of boards and commissions, and deputies, stenographers, clerks and employees of any such officer, board or commission, or of any institution, shall receive the salary provided by law, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided.

This section has been interpreted as prohibiting "... the payment of salary claims when an official or employee

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We then set forth the following guidelines, developed from the above-named cases, to assist in making the determination whether two public positions are incompatible and whether the duties of one position are germane to the duties of the second:

1. Incompatibility of offices or positions:

A. The employment contract or the applicable statutes with regard to the first position must not contain provisions which prevent employment after normal working hours.

B. The performance of the duties of the second position must not in any way interfere with the performance of the regular duties of the first position.

C. It must not be impossible to perform the duties of both positions. This refers not only to a physical impossibility, but also to an inconsistency in the functions of the two positions such as when one is subordinate to the other or when a contrariety and antagonism would result in an attempt by one person to discharge faithfully and impartially the duties of both. The duties performed in the second position must not be performed during the normal working day of the first position unless the member is on vacation or leave time.

D. Two positions are incompatible when the holder cannot in every instance discharge the duties of both.⁴

(footnote 3, continued)

draws or attempts to draw compensation for his regular employment in addition to that fixed by law for his duties, either by (a) an increase for those duties alone, or (b) by an increase for some addition to those duties. . . ." Op. Atty. Gen. No. 70-7-L.

Also of relevance is Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1943).

4. In this case, then, a teacher who is also a city official could attend to city duties after school hours, during vacation time, or during approved leave time. As discussed in footnote 7 below, the question of leave time is a matter left to the discretion of the school board. Consequently, a school board is not required to grant leave time to enable a teacher to perform the duties of a city official.

2. The duties of one position are germane to the duties of the second position if:

A. The duties of the first position are allied, relevant, appropriate, or pertinent to the duties of the second position.

B. One reasonably might expect a normally conscientious holder of the first position to perform, in his first position, the duties proposed for the second position.

Because of the variety of possible situations, each case must be judged on its particular facts and, therefore, the above criteria are intended to serve as guidelines and are not intended to be the exclusive criteria for determining whether one individual may receive compensation for two positions. pp. 4-5 (Emphasis added.)

Therefore, a school board may pay the full salary to a regularly employed teacher who is a paid city official while that teacher is absent from his or her duties and attending full-day city functions if it finds that (1) the two positions are not incompatible and (2) the duties of the teaching position are not germane to the duties exercised as a city official.⁵ We must emphasize that a teacher does

5. In this opinion we assume that the absences would be brief and infrequent and would be allowed pursuant to a board policy adopted after public discussion.

Op. Atty. Gen. Nos. 75-6 and 76-77 held that a school district may not grant a leave of absence with pay to a teacher unless permitted by statute. Although the conclusion in 75-6, which stated that a teacher who is a legislator may not be granted a paid leave of absence, is based on a finding that paid leaves of absence pursuant to A.R.S. § 15-444.02 are allowed only in the case of sabbatical leaves, we now would reach the same conclusion on the theory that the two positions are incompatible because the teacher-legislator cannot perform the duties of both positions while on an extended leave of absence. A.R.S. § 15-444.03(E) demonstrates a legislative intent to allow some form of leave with pay in addition to a sabbatical leave:

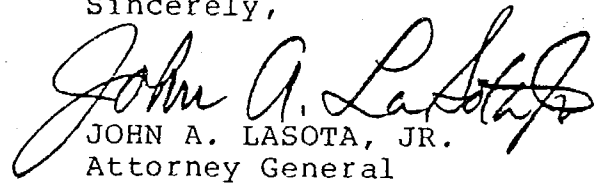
"If leave is granted, [leave without pay as well as paid sabbatical leave] all rights of tenure, retirement,

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not have the right to be paid when absent from his duties except where the right is conferred specifically by statute⁶ or is part of the fringe benefit policy adopted by a school board. The matter of salary and fringe benefits,⁷ which includes approved absences with or without pay is a matter generally left to the discretion of the local school boards⁷ which are authorized to adopt policies governing these matters.⁸

Sincerely,


JOHN A. LASOTA, JR.
Attorney General

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(footnote 5, continued)
accrued leave with pay, salary increments
and other benefits provided by law shall
be preserved and available to the
applicant after the termination of the
leave of absence." (Emphasis added.)

Therefore, Op. Atty. Gen. Nos. 75-6 and 76-77, which held that a leave of absence with pay cannot be granted unless approved by statute, are controlling only as they apply to leaves of absence granted pursuant to A.R.S. § 15-444.02 and not to leaves of absence which are part of a fringe benefit plan and granted in accordance with A.R.S. § 15-443.

6. A school board is required to approve a paid leave of absence, of up to 15 days a year, for teachers to perform military duty pursuant to appropriate orders. (A.R.S. § 26-168, National Guard; A.R.S. § 38-610, United States Armed Forces). See Op. Atty. Gen. Nos. 68-18 and 65-36-L.

7. School boards have the authority to employ and set the salaries for teachers pursuant to A.R.S. § 15-443(A). This has been interpreted to include fringe benefits. Board of Trustees of Marana Elementary School District No. 6 v. Wildermuth, 16 Ariz.App. 171, 492 P.2d 420 (1972); Board of Education v. Scottsdale Education Association, 17 Ariz.App. 504, 498 P.2d 578, (vacated on other grounds), 109 Ariz. 342, 509 P.2d 612 (1973); Syracuse Teachers Assn. v. Board of Education, 345 N.Y.S.2d 239, 42 A.2d 73 (1973); Hutton v. Pasadena City Schools, 68 Cal.Rptr. 103, 107, 261 Cal.App.2d 586 (1968). See also: Op. Atty. Gen. Nos. 73-21, 71-16, 58-29, 71-4, 64-14-C, 73-1-C.

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8. A board has the discretion to require the deduction of the cost of a substitute from the teacher's salary, to allow the teacher to receive his regular salary less any salary he receives on the day he is absent from his duties, to allow a leave without pay, or to allow a teacher to receive dual compensation on the day he is absent from his or her duties. We think there may be a question on whether a local school board's leave policy must have been adopted prior to the time that a board's employees entered into their contracts for the year in which a board grants leave with pay. A gift of public monies would result if the leave benefit were not a part of the teacher's contract but the gift would not necessarily be illegal if the teacher's leave activities conferred a benefit upon the school district. A determination on whether a school district would be benefited as a result of a teacher's leave activities must be made initially by the school board. City of Glendale v. White, 67 Ariz. 231, 237-239, 194 P.2d 435 (1948). See also Frohmler v. Board of Regents, 64 Ariz. 362, 366, 171 P.2d 356 (1946); Town of Gila Bend v. Walled Lake Door Company, 107 Ariz. 545, 550, 490 P.2d 551 (1971); Op. Atty. Gen No. 76-236.